Food, Drug, Beverage Warehousemen and Clerical Employees, Local 595, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Certified Grocers of California, Ltd.) *and* Raymond J. Gottschalk. Case 21-CB-7251

July 31, 1981

DECISION AND ORDER

On February 5, 1981, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, Respondent and General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Food, Drug, Beverage Warehousemen and Clerical Employees, Local 595, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In his Conclusions of Law the Administrative Law Judge concluded that the Union had violated Sec. 8(a)(1)(A) and (2) of the Act rather than 8(b)(1)(A) and (2). This inadvertent error is hereby corrected.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard before me in Los Angeles, California, on November 3, 1980. The charge and amended charge were filed, respectively, on March 17 and April 25, 1980, by Raymond J. Gottschalk, an individual. The complaint issued on May 6, 1980, alleging that Food, Drug, Beverage Warehousemen and Clerical Employees, Local 595, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended.

Issues

The primary issue is whether the Union violated Section 8(b)(1)(A) and (2) of the Act by giving inadequate notice of dues and reinitiation fee delinquencies to Gottschalk before enforcing a union-security clause, and causing his discharge.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Union.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Certified Grocers of California, Ltd., herein called the Company, a California corporation, is engaged in the sale and distribution of grocery products at various facilities, including a facility at 2601 South Eastern Avenue, Los Angeles, California. The Company annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. The complaint alleges, the answer admits, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

1. Background

The Company is a member of Food Employer's Council, Inc., herein called the Council, and as such is bound by an outstanding collective-bargaining contract that the Council has with various locals of the Teamsters including the Union herein. That contract contains a union-security clause which, *inter alia*, requires as a condition of continued employment that employees who are union members remain members in good standing in the Union. The contract defines good standing as "timely payment of regular dues and initiation fees, including reinitiation fees, uniformly applied to all members." The contract also provides that an employer shall discharge an employee at the expiration of 7 calendar days following receipt of a written notice from the Union that the employee has failed to maintain membership in good standing, "unless the employee has corrected the deficiency and the Employer is so notified within the seven (7) days."

The Union has an established procedure with regard to dues payment while an employee is on disability leave. A union member may request a withdrawal card when he is on disability leave. When an employee has such a

card he does not have to pay union dues for any month in which he does not work 3 days or more. Walter Pettit, a business agent for the Union, testified that when employees go on disability leave they are instructed about the withdrawal card procedure. He acknowledged, however, that he never instructed Gottschalk about that procedure. Gottschalk credibly testified that no one from the Union ever told him about the need for a withdrawal card.

2. The events leading to the discharge of Gottschalk

Raymond J. Gottschalk was hired by the Company as a warehouse orderman on September 21, 1978. He joined the Union 30 days after his hire. Pursuant to union rules he paid his dues on a quarterly basis, and he had no problem with his membership until mid-October 1979 when he left work on disability leave due to a back injury.

About the end of October 1979, he called union headquarters to find out what the procedure was with regard to dues payments during disability leave. He asked to speak to Union Business Agent Walt Pettit, but the secretary who answered the phone told him that Pettit was not in. Gottschalk asked her what the procedure was for paying dues while an employee was out of work because of an on-the-job injury. She told him that if he worked less than 3 days a month he did not have to pay union dues for that month.[1] Based on the information he received, Gottschalk did not pay union dues during the period of his disability leave.

On February 15, 1980, while Gottschalk was still on disability leave, the Union sent him a letter entitled "Notice of Suspension." The letter stated that union records indicated that he was a suspended member for nonpayment of dues for 3 months; that he owed a reinitiation fee of $15, a compulsory fine of $16, a late fine of $3, and $53.50 in dues amounting to a total of $87.50; that the total amount should be received by the Union no later than February 29, 1980; and that failure to observe the notice with respect to dues and reinitiation fee might cause his removal from the job. Gottschalk never received the letter. Prior to the time the letter was sent, Gottschalk had moved to a new address and he had not left a forwarding address for his mail. He gave the Company his new address, but he did not give it to the Union or the shop steward.

Gottschalk returned to work on February 26, 1980. As of that time, he had received no communication from the Union regarding his dues obligation other than the information he received when he spoke to the secretary at the union office. That information was that he did not have to pay dues for any month in which he worked less than 3 days.

About a week after Gottschalk returned to work, he approached Union Shop Steward Louie DeCosta[2] and asked him when he had to pay his union dues. Gottschalk told DeCosta that he had been off from work for 4 months. DeCosta said that he knew Gottschalk had been off from work and that Gottschalk had until the end of the month to pay his dues.[3]

By letter dated March 4, 1980, the Union notified the Company that Gottschalk had failed to pay dues and reinitiation fees as required. The letter, which was received by the Company on March 7, requested that Gottschalk be removed from the payroll at the end of 7 days, following receipt of the letter. The letter also stated that if Gottschalk corrected the deficiency within the 7 days, the Company would be notified. There is no indication in the letter that a copy was sent to Gottschalk. Neither the Union nor the Company notified Gottschalk that the letter had been sent, or that he had 7 days to make the payments. The first time that Gottschalk knew he had a problem was on March 14, 1980, when Western Union phoned to read him a mailgram. He received a copy of that mailgram the following day, on March 15. In the mailgram, the Company informed him that he was being involuntarily terminated effective March 14 at the request of the Union because of his failure to comply with the union-security clause of the collective-bargaining agreement.

3. The postdischarge events

On March 15, immediately after Western Union had read him the mailgram, which stated that he had been discharged, Gottschalk called Union Business Agent Pettit. He told Pettit that he had received a notice saying he was fired and he asked why he had not been told that he had to pay his dues right then. Gottschalk said that he had until the end of the month to pay his dues. Pettit replied that there was not anything that he could do about it and that Gottschalk could ask the Company's plant manager if he could be reinstated. Gottschalk filed the charge in this case on March 17, 1980.

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[1] Pettit credibly testified that secretaries were not authorized to give out information with regard to union policy. He acknowledged, however, that union policy did not require an employee who held a withdrawal card to pay union dues in a month in which he worked less than 3 days. Thus, the information that the secretary gave Gottschalk was accurate. However, the secretary made no mention of the need for a withdrawal card.

[2] The complaint alleges, the amended answer admits, and I find that DeCosta was an agent of the Union.

[3] These findings are based on the testimony of Gottschalk. DeCosta's version of the conversation was very different. DeCosta testified that he spoke to Gottschalk the first day after Gottschalk returned; that he told Gottschalk that the dues had to be paid immediately; that he showed Gottschalk a union printout of members in arrears, which set forth the amount Gottschalk owed; and that he told Gottschalk that unless he paid immediately his union card would be pulled, and that he needed a union card to work there. Gottschalk in his testimony denied that DeCosta told him those things. DeCosta was not a convincing witness. On direct examination, he testified that he told Gottschalk that if he did not pay the amount due his union card would be pulled. In that part of his testimony, DeCosta made no claim that he told Gottschalk that Gottschalk was subject to discharge if he did not pay the amount due. However, on cross-examination DeCosta expanded on his testimony. He was asked, "You testified that you told him his Union card would be pulled; is that correct?" and he answered, "No. I told him, 'you need a union card to work here.'" Still, later in his testimony, he combined the two concepts and testified that he told Gottschalk, "You ought to get down there now and take care of this because you need a Union card to work here. They will pull your union card." Gottschalk appeared to be a fully credible witness and as between Gottschalk and DeCosta I credit Gottschalk.

On March 21, 1980, Union Business Agent Pettit sent a letter to the Company. It was received on March 25 and it read:

> While the above named member [Gottschalk] neglected to give the Union a change of address and the notices of delinquency were mailed to his old address, we are requesting that he be reinstated on the job and given two days to pay $87.50 due the Union. This is done without admission of liability on the Union's part and merely as an equitable act.

On March 25, the Company's director of personnel, Charles Bemis, spoke to Pettit on the telephone about the letter. Pettit told Bemis that the request was made because Gottschalk had moved and the Union did not have his current address. Bemis told Pettit that he (Bemis) had been informed by his personnel office that shop steward DeCosta had spoken to Gottschalk shortly after Gottschalk returned to work and that DeCosta had told Gottschalk to get down and pay his dues. Pettit replied that DeCosta had told Gottschalk about the dues but that he did not tell him about the 7 day notice.

Gottschalk was reinstated to his former position with the Company on March 26, 1980. Shortly thereafter, Gottschalk paid the Union $87.50. That amount included the $15 reinitiation fee, the $16 compulsory fine, the $3 late fines, and the $53.50 dues. Pettit testified in substance that it is the Union's policy not to require the payment of compulsory fines and late fines with regard to enforcement of the union-security clause. However, Pettit's March 21, 1980, letter to the Company requested that Gottschalk be reinstated and given 2 days to pay $87.50 due the Union. That $87.50 included $16 compulsory fine and $3 late fines.

B. *Analysis and Conclusions*

A union has a right to enforce a lawful union-security clause. However, as the exclusive collective-bargaining representative of employees, it has the duty to represent employees fairly. When a union chooses to exercise its rights under a union-security clause and cause the discharge of an employee, whom it has the duty to represent, it is in a position where there is serious potential for conflict of interests. In such circumstances it is particularly important that the "fairness" standard be applied. As the Ninth Circuit Court of Appeals held in *N.L.R.B.* v. *Construction and Building Material Teamsters Local No. 291, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Kaiser Industries, Sand and Gravel]*, 633 F.2d 1295, 1299 (9th Cir. 1980), enfg. in pertinent part 236 NLRB 1100 (1978):

> The union is perfectly free to discourage delinquent dues payments by imposing sanctions on its members unless those sanctions interfere with a member's employment and his relations with his employer. In that event, the union's fiduciary duty to represent and deal fairly with its members comes into play. The provisions of the Act at issue here, §8(b)(2) and (1)(A), must be read with this duty in mind.

As the Board held in *Chauffeurs, Salesdrivers & Helpers Union, Local 572, International Brotherhood of Teamsters, Chauffuers, Warehousemen & Helpers of America (Ralphs Grocery Company)*, 247 NLRB 934, 935 (1980):[4]

> We find merit in the General Counsel's contention that "reasonably couched effort" to notify Roy of her membership obligations is not sufficient under Section 8(b)(1)(A) and (2) to satisfy the Union's fiduciary duty to her. In *N.L.R.B.* v. *Hotel, Motel & Club Employees' Union, Local 568, AFL-CIO [Philadelphia Sheraton Corp.]*,[6] the Third Circuit held that the "minimum" requirement of this duty is to "inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." In *Teamsters Local Union No. 122 (August A. Busch & Co. of Mass., Inc.)*,[7] the Board specifically defined the union's duty as including "a statement of the precise amount and months for which dues were owed, as well as an explanation of the methods used in computing the amount" plus "an adequate opportunity to make payment." In *Chauffeurs, Teamsters and Helpers Local Union 150, et al. (Delta Lines)*,[8] we stressed that inquiries made by an individual as to his or her obligations do not relieve a union of its *affirmative* duty under the Act specifically to inform an individual of his obligations and afford him a reasonable opportunity to satisfy them before seeking his discharge under a union-security clause.

[6] 320 F.2d 254, 258 (1963), enfg. 136 NLRB 888 (1962).

[7] 203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974).

[8] 242 NLRB 454 (1979).

Actual as opposed to constructive notice of a dues delinquency is required. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local Lodge No. 732, AFL-CIO (Triple A Machine Shop, Inc., d/b/a Triple A South)*, 239 NLRB 504 (1978). A union does not meet its duty to notify an employee of a dues delinquency merely by sending the employee a letter, if the letter is not received. As the Board held in *District 9, International Association of Machinists and Aerospace Workers, AFL-CIO (Marvel-Schebzer, Division of Borg-Warner Corp.)*, 237 NLRB 1278 (1978):

> The Administrative Law Judge's finding that the Respondent fulfilled its fiduciary duty toward York simply by mailing him a notice informing him of his obligation with respect to dues while out sick, without regard to whether York received the notice, is mistaken. We have consistently held that, absent extenuating circumstances, a union which seeks to enforce a union-security clause with respect to particular employees has the absolute duty to see that

[4] See also *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98 (1980); *United Metaltronics and Hospital Supply Employees, Local 955 (Pharmaseal Laboratories, Inc.)*, 254 NLRB 601 (1981).

> they are in fact informed of their financial membership obligations prior to demanding the employees' discharge for nonpayment of regular dues and fees. Thus, it is not sufficient for a union simply *to attempt* to notify employees of the obligation with which they must comply in order to protect their employment status.

In the instant case there are no such extenuating circumstances. There is no showing that Gottschalk displayed bad faith or was willfully and deliberately evading his financial obligations. *Chauffeurs, Teamsters and Helpers Local Union 150, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Delta Lines)*, 242 NLRB 454 (1979).

An employee may only be discharged for nonpayment of dues under a union-security clause where the evidence establishes that the employee made a conscious choice to withhold his dues. Ignorance or inadvertence on the part of the employee is not sufficient. As the Ninth Circuit Court of Appeals held in *N.L.R.B.* v. *Construction and Building Material Teamsters Local No. 291, IBT, supra:*

> In *Conductron Corp.*, 183 NLRB 419, 426 (1970), the Board stated:
>
> > [T]he extremity of the penalty against the employee for nonpayment of dues requires that it should not be sanctioned unless as a practical matter the union has taken the necessary steps to make certain that a reasonable employee will not fail to meet his membership obligation through ignorance or inadvertence but will do so only as a matter of conscious choice.
>
> In our view this is a salutary rule.

Though the Union sent Gottschalk a letter relating to dues delinquency, that letter was not received. The Union's attempt to inform Gottschalk of his obligation was not adequate notice. In fact, Gottschalk was not informed of his financial obligation. Shop steward DeCosta spoke with Gottschalk about dues requirements after Gottschalk returned to work. Gottschalk was entitled to a statement of the precise amount and months for which dues were owed, an explanation of the methods used in computing the amount, and an adequate opportunity to make payment. DeCosta's comments fell far short of providing the necessary notice. The evidence clearly establishes that Gottschalk failed to meet his membership obligation through ignorance or inadvertance and not as a matter of conscious choice. Under such circumstances, the Union could not lawfully request or require his discharge pursuant to the union-security clause. I find that the Union violated Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Union, as set forth in section III, above, occurring in connection with the business operations of the Company as set forth in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Union engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I also recommend that the Union be ordered to make Gottschalk whole for any loss of wages and other benefits resulting from the discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages and other benefits from March 14, which was the date of his discharge, to March 26, 1980, which was the date of his reinstatement, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5]

In his brief, counsel for the General Counsel requests that I recommend that the Union be ordered to refund to Gottschalk the reinitiation fee and compulsory and late fines paid by him to the Union. In *Construction and Building Material Teamsters Local No. 291, IBT*, 236 NLRB 1100, enfd. in part 633 F.2d 1295, 1299, the Board modified the Administrative Law Judge's decision by adding a requirement that a union refund the reinitiation fees paid by an employee.[6] The Ninth Circuit Court of Appeals refused to enforce that part of the Board's order, holding:

> The Board added to the order recommended by the Administrative Law Judge the requirement that the union pay back to White the reinitiation fee paid by him. This portion of the order we decline to enforce. It is by means of this type of sanction that the union can discourage delinquency. We find nothing in the findings of the Administrative Law Judge to suggest that failure to waive reinitiation fee in this case did not comport with past practice. That should, in our view, be the proper standard.

The current Board law is set forth in *Chauffeurs, Salesdrivers & Helpers Union, Local 572, IBT (Ralphs Grocery Company), supra* at 936, fn. 10, where the Board held:

> Although we find a violation of Sec. 8(b)(1)(a) and (2), we shall not, as counsel for the General Counsel requests, order Respondent to refund Roy's reinitiation fee. Counsel for the General Counsel argues that a refund must be ordered to preserve the *status quo ante*, citing *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local Lodge No. 732, AFL-CIO (Triple A Machine Shop, d/b/a Triple A South)*, 239 NLRB 504 (1978), and *Teamsters Local Union No.*

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[6] See also *District 9, IAM (Borg-Warner Corp.), supra* at 1279, fn. 3.

122 (August A. Busch & Co. of Mass., Inc.), supra. [203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974).] In each of these cases the finding of a violation due to lack of notice was coupled with evidence of inconsistent enforcement of the delinquency rules, rendering the assessment of the reinitiation fee invalid. In *Triple A South*, the Administrative Law Judge found that the insufficient notice was part of an "invidious scheme to collect reinstatement fees." In *August A. Busch*, there was an additional finding that the fees had not been imposed uniformly. Here, there is no evidence of inconsistent enforcement and no allegation that Roy did not actually owe the fee under Respondent's bylaws. We shall, therefore, award her only the loss of earnings she incurred as a result of the Respondent's request that she be discharged.

That analysis applies equally to the instant case, and I therefore shall not recommend that the Union be ordered to refund the reinitiation fee and compulsory and late fines paid by Gottschalk.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By attempting to cause and causing the Company to discharge Gottschalk for failure to tender periodic dues and reinitiation fee without adequately advising him of his obligations, the Union has engaged in unfair labor practices within the meaning of Section 8(a)(1)(A) and (2) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Food, Drug, Beverage Warehousemen and Clerical Employees, Local 595, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Certified Grocers of California, Ltd., to discharge or to otherwise discriminate against Raymond J. Gottschalk, or any other employee, for failure to tender periodic dues or reinitiation fees without adequately advising them of their obligations.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Raymond J. Gottschalk for any loss of pay and other benefits he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decison entitled "The Remedy."

(b) Post at its business offices, hiring halls, and meeting places, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Forward a sufficient number of signed copies of said notice to the Regional Director for Region 21, for posting by Certified Grocers of California, Ltd., at its place of business in Los Angeles, California, in places where notices to employees are customarily posted, if said employer is willing to do so.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Governmemnt

WE WILL NOT cause or attempt to cause Certified Grocers of California, Ltd., to discharge or to otherwise discriminate against Raymond J. Gottschalk, or any other employee, for failure to tender periodic dues or reinitiation fees without adequately adivising them of their obligations.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL make Raymond J. Gottschalk whole for any loss of pay and other benefits he may have suffered as a result of our discrimination against him by paying him backpay with interest.

FOOD, DRUG, BEVERAGE WAREHOUSEMEN AND CLERICAL EMPLOYEES, LOCAL 595, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA